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OCTOBER TERM, 1997

No. 98-404

OFFICE OF THE CLERK
SUPREME COURT, U.S.

V.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

- ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT MOTION TO EXPEDITE CONSIDERATION
OF JURISDICTIONAL STATEMENT AND TO ESTABLISH
EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT
IF PROBABLE JURISDICTION IS NOTED

The district court in this case has held that the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000 would violate the Census Act. The jurisdiction of the district court was based on Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482. Section 209(e)(1) also provides that "[a]ny final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States." 111 Stat. 2482. A notice of appeal to this Court was filed on August 25, 1998. The Solicitor General, on behalf of the federal defendants in this case, filed a jurisdictional

statement on September 4, 1998.

Section 209(e)(2) of the Appropriations Act states that "[i]t shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of" any suit brought pursuant to Section 209(e)(1) to challenge the Commerce Department's plan for conducting the decennial census. 111 Stat. 2482. Accordingly, the parties jointly move to expedite consideration of the jurisdictional statement and to establish an expedited schedule for briefing and argument if probable jurisdiction is noted.

The jurisdictional statement was filed on September 4, 1998. Appellee House of Representatives agrees that the Court should note probable jurisdiction, and for that reason will not file any response to the jurisdictional statement.

We respectfully propose that the Court adopt one of the following alternative briefing schedules. The first is proposed so that argument can be heard on November 30, 1998, the first day of the Court's December argument session. The second schedule is proposed so that argument could be heard two weeks earlier, on November 16, 1998. Although that date is not set aside on the Court's calendar for oral argument, the Court is scheduled to sit on that day. Under the first schedule, the opening briefs on the

merits for the appellants and the intervenor-defendants would be filed on October 6, 1998; the appellee's brief on the merits would be filed on November 3, 1998; the reply briefs for the appellants and the intervenor-defendants would be filed on November 17, 1998; and oral argument would be held on November 30, 1998. Under the second schedule, the opening briefs on the merits for the appellants and the intervenor-defendants would be filed on October 1, 1998; the appellee's brief on the merits would be filed on October 29, 1998; the reply briefs for the appellants and the intervenor-defendants would be filed on November 9, 1998; and oral argument would be held on November 16, 1998.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers," and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Ibid.* See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Pursuant to the Census Clause, Congress has enacted the Census

Act, 13 U.S.C. 1 et seq. The Act provides, inter alia, that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, * * * in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

2. The district court order from which this appeal is taken arose out of a suit filed by the United States House of Representatives in the District Court for the District of Columbia. The district court held that the House had standing to sue and that the alleged harms were sufficiently immediate to satisfy the requirements of Article III. On the merits, the court held that 13 U.S.C. 195 prohibits the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States.

3. As pointed out above, Section 209(e)(2) of the Appropriations Act states that "[i]t shall be the duty of * * * the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of" a case

filed under Section 209(e)(1) of that Act to challenge the Commerce Department's plan for conducting the decennial census. 111 Stat. 2482. In addition, the Commerce Department is required by law to prepare to implement the 2000 census without the use of statistical sampling techniques. See Appropriations Act, § 209(j), 111 Stat. 2483. The Department's effort to prepare to conduct the census with or without sampling has significantly complicated its planning activities. The Department of Commerce has informed the Solicitor General that, in its professional judgment, if the current uncertainty regarding the use of sampling in the 2000 census continues beyond March 1999, its ability to conduct the most accurate census possible will be seriously threatened. The Department of Commerce has also informed the Solicitor General that the longer it takes to resolve that question, the more difficult it will be to reach that goal.

There is consequently a strong public interest in prompt review by this Court of the district court's decision. Accordingly, the parties jointly move to expedite consideration of the jurisdictional statement and to establish an expedited schedule for briefing and argument if probable jurisdiction is noted. During each of the past two Terms, the Court has granted a similar motion of the parties for expedited consideration of the jurisdictional statement and for an expedited briefing schedule under a statute (the Line Item Veto Act) that contained a similar

expedited judicial review provision. See Clinton v. City of New York, 118 S. Ct. 1123 (1998); Raines v. Byrd, 117 S. Ct. 1489 (1997). See also United States v. Eichman, 494 U.S. 1063, 496 U.S. 310, 313 & n.2 (1990) (granting motion to expedite consideration of jurisdictional statements and setting expedited briefing and argument schedule for appeal under statutory provision for expedited direct appeal under Flag Protection Act).

We respectfully propose that the Court adopt one of the two alternative schedules set out at pages 2-3, above: (1) opening briefs on the merits for the appellants and the intervenor-defendants to be filed on October 6, 1998; the appellee's brief on the merits to be filed on November 3, 1998; reply briefs for appellants and intervenor-defendants to be filed on November 17, 1998; and oral argument to be held on November 30, 1998; or (2) opening briefs on the merits for the appellants and the intervenor-defendants to be filed on October 1, 1998; the appellee's brief on the merits to be filed on October 29, 1998; reply briefs for appellants and intervenor-defendants to be filed on November 9, 1998; and oral argument to be held on November 16, 1998. Counsel for the four groups of intervenor-defendants, who are deemed parties in this Court under Rule 18.2 of the Rules of this Court, agree to the proposal set forth above.

Respectfully submitted.

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Counsel for Appellee
United States House
of Representatives

SEPTEMBER 1998

Seth P. Waxman
 SETH P. WAXMAN
Solicitor General